Supreme Court, U. S.
FILED
MAR 27 1979
MICHAEL RODAK, JR., CLERK

No. 78-1196

In the Supreme Court of the United States

OCTOBER TERM, 1978

COUNTY OF THURSTON, NEBRASKA, PETITIONER

v.

CECIL D. ANDRUS, SECRETARY OF THE INTERIOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General

JAMES W. MOORMAN
Assistant Attorney General

JACQUES B. GELIN
NANCY B. FIRESTONE
Attorneys
Department of Justice
Washington, D.C. 20530

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1196

COUNTY OF THURSTON, NEBRASKA, PETITIONER

v.

CECIL D. ANDRUS, SECRETARY OF THE INTERIOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 23-51) is reported at 586 F. 2d 1212. The opinion of the district court (Pet. App. 1-20) is not reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 52-53) was entered on November 6, 1978. The petition for a writ of certiorari was filed on February 1, 1979. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

The Act of May 6, 1910, ch. 202, 36 Stat. 348, as amended by the Act of December 30, 1916, ch. 10, 39

Stat. 865 (Brown-Stephens Act), is set forth at Pet. App. 62-64. The General Allotment Act of 1887, 25 U.S.C. 331 *et seq.*, is set forth at Pet. App. 54-61.

QUESTION PRESENTED

Whether, under various Indian treaties and federal statutes, petitioner can tax land held in trust by the United States for the benefit of Omaha and Winnebago Indians without the Indians' consent.

STATEMENT

In this case petitioner, the County of Thurston, Nebraska, claims the right to impose a property tax on certain lands that are held in trust by the United States for members of the Omaha and Winnebago Indian Tribes and that have been leased to third parties. Petitioner seeks to compel the Secretary of the Interior to pay petitioner sums representing alleged tax deficiencies for those lands.

1. In the mid-19th century, the Omaha and Winnebago Tribes ceded most of their land to the United States by treaties, retaining reservation lands in the County of Thurston and elsewhere (Pet. App. 31-32). In 1887, pursuant to the then federal policy of Indian assimilation, Congress enacted the General Allotment Act of 1887, 25 U.S.C. 331 *et seq.* Under the Act, the Secretary was authorized to allot reservation lands to individual Indians. The allotments were to result in fee simple patents, "free of all charge or incumbrance whatsoever" (25 U.S.C. 348), after a certain period during which the land was to be held in trust for the allottee by the United States (*ibid.*). The Act provided that the trust period was to be 25 years, commencing with the Secretary's approval of the allotment, or any longer period that the President provided (*ibid.*). The trust periods were subsequently extended indefinitely by statute, and the lands at issue in this case are still held in trust by the United States (25 U.S.C. 461, 462; Pet. App. 36).

Decisions of this Court and the lower federal courts have consistently held that the Allotment Act and the original Indian treaties intended to exempt lands held in trust from taxation. See, *e.g.*, *Squire* v. *Capoeman*, 351 U.S. 1, 6-10 (1956). Relying on this Court's decision in *Choate* v. *Trapp*, 224 U.S. 665 (1912), the lower federal courts have also consistently held that Indian treaties ceding land to the United States, together with the Allotment Act, gave allottees of trust land a vested right to tax exemption during the trust period unless the allottees consented to taxation—a right that could not be abrogated by federal statute without just compensation. (See page 6, *infra*, and cases cited.)

In 1916 Congress enacted the Brown-Stephens Act, ch. 10, 39 Stat. 865 (Pet. App. 63-64), dealing specifically with Omaha and Winnebago trust lands in Nebraska. That Act provides that such lands are "subject to [tax] appraisement and assessment * * * and subject to [state and local] taxation * * *" (Section 1). It further provides, however, that so long as they are held in trust, such lands "shall not be subject to levy and tax sale * * *" (Section 2). Instead, it provides an alternative means of collection: If the taxes are not paid on time, the county treasurer may certify the delinquencies

> to the Secretary of the Interior, who shall be authorized to pay the same from any funds belonging to the Indian allottees owning such lands so taxed and arising from the rentals thereof or under his control; and in the event that no such funds shall be in the possession or under the control of the Secretary of the Interior, he shall certify that fact to the said county treasurer, which certificate shall operate as a full release and discharge of the tax assessed * * *. [*Ibid.*]

2. There are 34,000 acres of trust land in Thurston County, and since the enactment of the Brown-Stephens Act, petitioner has assessed and collected taxes on the

portion of that land—some 18,000 acres—that has been leased to non-Indians.[1] In most instances, the leases issued before 1972 provided for the payment of rent and of state and local taxes by the non-Indian lessees. Most leases provided for both the rent and the tax payments to be made directly to the BIA office. Under this arrangement, the money received by the BIA was placed into two separate accounts: Special Deposit Accounts (SD Accounts), which held the money for local taxes, and Individual Indian Money Accounts (IIM Accounts), which held the rental money. Funds in IIM Accounts may be withdrawn by adult Indians on request, subject to certain minor restrictions. 25 C.F.R. 104.3 (Pet. App. 27-28).

In 1972, at the Tribes' request, the BIA stopped paying county taxes on trust lands.[2] In addition, the BIA removed the tax collection provision from new lease agreements and stopped establishing new SD Accounts. Funds remaining in the SD Accounts were transferred to the IIM Accounts (Pet. App. 28-29).

Since 1972, the County Treasurer has certified lists of overdue taxes for the years 1965-1972 to the Secretary of the Interior, as provided by the Brown-Stephens Act. The

[1]The leasing of trust property is authorized under regulations prescribed by the Secretary of the Interior; individual leases are approved by the local office of the Bureau of Indian Affairs (Pet. App. 28).

[2]The request was made because of the Tribes' general dissatisfaction with county services and, in particular, road maintenance. In response to the Tribes' request, the BIA surveyed the individual allottees to determine whether any of them wished to continue payment. Only a handful of allottees agreed to continued taxation. Silence was construed as a lack of consent (Pet. App. 28-29 & n.3).

Secretary took no action concerning the overdue taxes for 1965 to 1970. In 1973 and 1974, the Secretary certified that funds were not available for payment of the 1971 and 1972 taxes. At the time of the County Treasurer's first certification in March 1972, however, there were funds available in the SD Accounts for tax payments. Failing to obtain payment, petitioner sought a writ of mandamus to compel the Secretary to pay $359,598.15 in overdue taxes from funds in his control, and to require the Secretary to retain funds received from rents for any future tax delinquencies (Pet. App. 30).

3. Following a trial, the district court held that Omaha and Winnebago trust allottees have a vested right to be exempt from taxation during the trust period, which the Brown-Stephens Act did not abrogate (Pet. App. 9-11). The court also held that most allottees, through their lease agreements, had consented to taxation before April 1972, but that they had effectively revoked their consent thereafter (Pet. App. 12). The court concluded that petitioner was entitled to payments for overdue taxes from the Secretary for the years 1969, 1970, and 1971,[3] and ordered the Secretary to make those payments from rental funds currently in his control (Pet. App. 20).[4]

The court of appeals affirmed the district court's conclusions of law (Pet. App. 24-48), but vacated the order requiring the Secretary to make payments to petitioner. The order was vacated on the ground that, without the allottees' consent, the district court had no authority to order taxes to be paid from the allottees' current rental income (Pet. App. 48-51).

[3]The court held that petitioner's claims for years before 1969 were barred by the statute of limitations (Pet. App. 18-19).

[4]The court's order also provided that if the funds currently in the Secretary's control were insufficient to satisfy the delinquencies, the Secretary should pay the deficiency from rents received on behalf of the allottees over the next three years (Pet. App. 22).

ARGUMENT

Petitioner seems to contend (Pet. 10-13) that the court of appeals erred in holding that the Indian allottees in this case acquired a vested property right in exemption from taxes on trust lands (*i.e.*, a right that could not be abrogated by federal statute without compensation to the allottees), and in holding that the Brown-Stephens Act was not intended to abrogate that right. Petitioner apparently claims that the tax exemption acquired by the allottees was subject to abrogation without compensation, and that the Brown-Stephens Act had that effect.

Petitioner's claims are incorrect. In any event, they involve no questions of general importance and no conflict among the circuits, and they do not warrant this Court's review.

1. The court of appeals' holding that the original Indian treaties and the General Allotment Act of 1887 gave the allottees a property right in exemption from taxes on trust lands is in accord with a long and consistent line of cases based on this Court's decision in *Choate* v. *Trapp*, *supra*. See *Glacier County* v. *United States*, 99 F. 2d 733, 734 (9th Cir. 1938); *United States* v. *Nez Perce County*, 95 F. 2d 232, 234-235 (9th Cir. 1938); *Board of Commissioners of Caddo County* v. *United States*, 87 F. 2d 55, 56 (10th Cir. 1936); *United States* v. *Benewah County*, 290 F. 628, 631 (9th Cir. 1923); *Morrow* v. *United States*, 243 F. 854, 855-856 (8th Cir. 1917); *Board of Commissioners of Jackson County* v. *United States*, 100 F. 2d 929, 933 (10th Cir. 1938), modified, 308 U.S. 343 (1939); *Minnesota* v. *Zay Zah*, 259 N.W.2d 580, 584-585 (Sup. Ct. Minn. 1977), cert. denied, 436 U.S. 917 (1978). See also *Mahnomen County* v. *United States*, 319 U.S. 474, 476-477 (1943); *Kirkwood* v. *Arenas*, 243 F. 2d 863, 869 (9th Cir. 1957). As the court of appeals properly concluded, the allottees' right to be exempt from taxation is derived from a "confluence of

trust and contract law principles applied against the backdrop of the unique relationship between the federal government and the Indians" (Pet. App. 39).

Petitioner does not challenge the principles established and applied in *Choate* v. *Trapp* and other cases, but argues that they were misapplied to the particular facts and circumstances of this case (Pet. 10-12). Petitioner, however, does not demonstrate how the facts of this case are materially different from the other cases in which those principles have been applied. In any event, reviewing the application of settled principles to the particular facts of a case is not an appropriate task for this Court. *Berenyi* v. *Immigration Director*, 385 U.S. 630, 635 (1967).

Moreover, although the court of appeals concluded that the allottees in this case have a vested property right to tax exemption, this case presents no question of the power of Congress to abrogate that exemption (or of the allottees' remedy in the event that Congress did so). For the court of appeals also held, correctly, that Congress had not abrogated that exemption by the Brown-Stephens Act.[5]

2. Petitioner also apparently contends (Pet. 12-13) that the court of appeals erred in concluding that the Brown-Stephens Act did not intend to subject trust lands to county taxation without the allottees' consent. The court's conclusion was consistent with its earlier decision in *Allbaugh* v. *United States*, 184 F. 2d 109 (8th Cir.), cert. denied, 340 U.S. 905 (1950), and was correctly based on its determination (Pet. App. 43-44) that "there is no suggestion in either the language or history of the Brown-

---

[5]If allottees have a vested property right in tax exemption and Congress had in fact abrogated that right by statute, the allotees would presumably have a right to compensation enforceable in the Court of Claims. See *Menominee Tribe* v. *United States*, 391 U.S. 404, 413 (1968).

Stephens Act that it was intended to alter any vested interest of the allottees."[6] Petitioner offers no reasons or arguments in support of its contrary contention.

3. Finally, petitioner argues (Pet. 13-14) that review is warranted to consider the financial ramifications of the court of appeals' decision for a county such as Thurston. The argument is unfounded. Lessees of Indian property in many instances are subject to state taxation (see *Oklahoma Tax Commission* v. *Texas Co.*, 336 U.S. 342 (1949)), and the court of appeals specifically noted (Pet. App. 42) that its determination did not foreclose the assessment and collection of a tax on the leasehold interest in allotted lands held by lessees. See, *e.g.*, *Fort Mojave Tribe* v. *San Bernardino County*, 543 F. 2d 1253, 1256 (9th Cir. 1976), cert. denied, 430 U.S. 983 (1977).

---

[6]As this Court said with respect to a similar question in *Menominee Tribe* v. *United States*, *supra*, 391 U.S. at 413 (footnote omitted): "We find it difficult to believe that Congress, without explicit statement, would subject the United States to a claim for compensation by destroying property rights conferred by treaty * * *."

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

JAMES W. MOORMAN
Assistant Attorney General

JACQUES B. GELIN
NANCY B. FIRESTONE
Attorneys

MARCH 1979

DOJ-1979-03